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No. _____

In The
Supreme Court of the United States

WILLIAM DUPRE,
Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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July 7, 2008

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QUESTIONS PRESENTED

1. Whether there are any circumstances under which a party litigant's exorbitant campaign contributions, made to the presiding judge and/or justice, while the matter is pending, can violate the opposing party's right to an impartial tribunal.

2. Whether Ohio can deprive Petitioner of his right to an impartial tribunal by claiming that it lacks a procedural remedy for the violation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Smart Media of Delaware, Inc. was a counterclaimant-appellee/movant/appellant below and will likely join in William Dupre's petition, or will file its own petition at a later date. Respondent Telxon Corporation is a wholly-owned subsidiary of Respondent Symbol Technologies, Inc., which is a wholly-owned subsidiary of Motorola, Inc.

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I. A right to an impartial tribunal is little better than no right at all when judges are free to preside over matters where parties have already contributed exorbitant sums to their campaigns, or where a party

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II. This Court should hear the matter because neither Ohio, nor any other State, is free to deny a litigant his right to an impartial tribunal by denying him a procedural remedy through which he can enforce that right. 22

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Dupre respectfully submits this petition for a writ of certiorari to review the judgment of the Ohio Supreme Court in which it declined jurisdiction to review the judgment rendered by the appointed panel for Ohio's Ninth District Court of Appeals.

OPINIONS BELOW

The opinion of the Ohio Supreme Court declining jurisdiction and the opinion of the appointed appellate panel are not reported but are attached to Petitioner's Appendix.

JURISDICTION

The Ohio Supreme Court entered judgment on April, 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Introduction.

In *UpJohn Co., v. United States*, 449 U.S. 383, 393 (1981), this Court observed that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* Regrettably, a litigant's right to an impartial tribunal, as articulated by a majority of this Court in *Republican Party v. White*, 536 U.S. 765, 775-76 (2002), has become so obscured by the influx of campaign contributions into the judicial process, that to the extent the right still exists, it is little better than no right at all. The absence of a pronouncement by this Court as to whether a litigant's right to an impartial tribunal can be violated by campaign contributions has resulted in both inter-state and intra-state conflicts regarding the application of this constitutional right.

The courts of last resort in the respective states are in total disagreement as to whether a litigant's right to an impartial tribunal is violated as the result of campaign contributions made by one of the parties to a judge while a matter is proceeding before that judge. *Compare Pierce v. Pierce,* 39 P. 3d 791, 798-99 (Okla. 2001) (ruling that the judge's failure to self disqualify after receiving two $5,000 contributions constituted "a violation of due process"), *with Caperton v. A.T. Massey Coal Co.,* No. 33350, 2008 W. Va. LEXIS 22, *205 n.16 (W. Va. Mar. 12, 2008) (where the dissent criticized the majority's failure to acknowledge the due process implications of presiding over a matter where one of the parties had contributed approximately $3.5

million to the campaign of a sitting justice). Not unlike West Virginia, in Ohio the answer to the question of whether a litigant's right to an impartial tribunal is violated by excessive and well-timed campaign contributions is completely dependent upon which judge is being asked. *Compare* Pet. App. at 11-12a, ("A fair trial in a fair tribunal is a basic requirement of due process." *Citing Tumey v. Ohio*, 273 U.S. 510, 532 (1927)), *with* Pet. App. at 1a (finding no "substantial" constitutional question).

From this sea of uncertainty, arises a leviathan of a case in which a "$212 million plus judgment [was] erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual." Pet. App. at 18a.

II. Background.

For those who do not follow politics in Ohio, it is difficult to appreciate the context of what occurred below without knowing Alex Arshinkoff. Arshinkoff is the Chairman of the Summit County Republican Party and was the conduit for the "approximately $1,000,000.00 in contributions" given by the former CEO and Chairman of Respondent Telxon Corporation, Robert F. Meyerson. Pet. App. at 18a. Arshinkoff is said to run the Summit County Republican Party as a "Tammany Hall" style machine. *See,* Sandy Theis, *Democrat Questions Petro Endorsement of Montgomery*, Cleveland Plain Dealer, Mar. 3, 2006, at B2. The person who made the observation was a member of Arshinkoff's party and former Ohio Attorney General. *Id.* The Akron Beacon

Journal's editorial board has gone so far as to describe Arshinkoff as a "serial political bully." Editorial, *The Arshinkoff Effect*, Akron Beacon Journal, Sept. 30, 2005, at B3. The Ohio judiciary has not been immune from Arshinkoff's attempts to exert his influence.

In 1984, Arshinkoff was successfully sued for blocking a member of his own party from having his name placed on the primary ballot for judge. *Ohio Ex. rel. Morgan v. Arshinkoff*, 472 N.E.2d 1134, 1136 (Ohio Ct. App. 1984). After a 2002 judicial election for Summit County Probate Court, Arshinkoff's candidate was reprimanded by the Office of Disciplinary Counsel for a case that involved "in kind" campaign contributions made by the party and the "inappropriate content" of an advertisement that was produced by Arshinkoff. *Disciplinary Counsel v. Spicer*, 834 N.E.2d 332, 335-36 (Ohio 2005). By September 2005, Arshinkoff was refusing to take no for an answer and two judges from within his party signed affidavits of prejudice indicating that Arshinkoff had engaged in "judicial intimidation." Lisa A. Abraham, *Judges Say Official Tried to Interfere*, Akron Beacon Journal, Sept. 28, 2005, at B5. When asked to explain his behavior, Arshinkoff indicated that he was simply exercising his right to speak freely. *The Arshinkoff Effect*, *supra*, at B3.

By November of 2005, the press was openly questioning the independence of Summit County judicial candidates who were backed by Arshinkoff. Editorial, *Toadies on the Bench,* Akron Beacon Journal, Nov. 4, 2005. Within two years, Summit County Republicans became concerned that Arshinkoff was becoming more of a liability than an asset and

undertook efforts to end his "three-decade reign." Phil Trexler & Katie Byrd, *Summit GOP's Arshinkoff Challenged*, Akron Beacon Journal, Aug. 18, 2007, at A1. During the intra-party battle, it was revealed that the Summit County Republican Party's financial records were "impossible to audit." Stephanie Warsmith, *Mistakes Fill GOP Finance Reports*, Akron Beacon Journal, Dec. 27, 2007, at A1. That an employee of the Summit County Board of Elections would issue such a statement was no small matter as Arshinkoff was also a board member. *Id.*

These reports led to apprehension within the party that Arshinkoff simply exercised too much power through his control of campaign funds. Julie Carr, *GOP Chief Under Fire*, Associated Press, Columbus Dispatch, Mar. 10, 2008, *available at* www.dispatchpolitics.com/live/content/local_news/stories/2008/03/10/z-apoh_party_boss_0310.ART_ART_03-10-08_B5_FM9JJ6P.html?sid=101. "Arshinkoff's demands that donors give to the party, rather than spreading their contributions among the individual candidates, is both the source of the party's might and heart of the criticism against it." *Id.* In March 2008, Arshinkoff was removed from the Board of Elections by the Ohio Secretary of State because of reports that the Board's employees were being harassed, intimidated and threatened. *Id.* Notwithstanding the foregoing, the coup attempt against Arshinkoff failed in late spring of this year and he continues to serve as one of the most powerful and notorious party county chairmen in Ohio.

III. Procedural History.

On December 1, 1998, Respondent Telxon Corporation (Telxon) filed a complaint against Petitioner's former employer, Smart Media of Delaware, Inc. (Smart Media) in the Summit County Court of Common Pleas. The complaint was a declaratory judgment action seeking a determination that Telxon had not entered into any contracts and had not made any promises that could reasonably be relied upon. Petitioner William Dupre (Dupre) and Smart Media, both of whom resided outside of Ohio, filed counterclaims and the case proceeded to trial on August 25, 2003. Dupre's claims sounded in fraud, breach of contract and promissory estoppel and arose from Telxon's broken promises to invest $6 million in Smart Media, a start-up company, and to develop the prototype for an internet based self-scanning device known as the Smart Handle. In reliance upon these promises Dupre left his job as an executive with a retail marketing company. After nine months of promises and delay, Telxon pulled the rug out from under both Dupre and Smart Media and indicated that it had no intention of honoring its agreement. In September 2003, after a three-week trial, the jury returned verdicts in favor of Dupre and Smart Media in the amounts of $6.2 million and $212 million, respectively.

The judgments were appealed to the Ninth District Court of Appeals in Summit County Ohio. On September 25, 2005, Judge William Batchelder authored a vitriolic 119-page opinion on behalf of the majority of the court, belittling the litigants, chastising their counsel, insulting the trial judge, and ultimately

reversing all of the jury's verdicts. The decision was not unanimous as Judge Carr, a Republican, demonstrated considerable courage and dissented. On the exact same day the decision was announced, Judge Batchelder left the bench to run for the Ohio House of Representatives.

Dupre filed a notice of appeal with the Ohio Supreme Court seeking a reversal of the decision because: (1) Judge Batchelder's decision eviscerated controlling precedent; (2) Judge Batchelder's decision substituted case law from foreign jurisdictions for Ohio precedent in order to justify the result that was ultimately reached; (3) Judge Batchelder ignored evidence and argument that supported Dupre's position; and (4) Judge Batchelder's decision contained conclusions based upon facts that were not presented by the record.[1] By way of a 4-3 vote, the Ohio Supreme Court declined jurisdiction on February 22, 2006.

For months, the matter was closed. Then on January 9, 2007, Smart Media filed a motion to vacate the judgment that was entered by the Ninth District Court of Appeals based upon the discovery of $1,000,000.00 in campaign contributions made by the former CEO and Chairman of Telxon, Robert F.

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[1] Although Dupre provided excruciating detail as to the fundamental flaws in Judge Batchelder's decision before the Ohio Supreme Court, and Smart Media provided the same in its motion to vacate the judgment, neither the appointed panel nor the Ohio Supreme Court addressed the merits of Judge Batchelder's ruling. As the factual and legal flaws in the original decision are collateral to the issues on this appeal, they will be provided if this Court requests briefing on the issue.

Meyerson, to the Summit County Republican Party, all while the case was pending.[2] Three days later, the Akron Beacon Journal printed an article that attributed direct quotes to Judge Batchelder. Phil Trexler, *Ex-Judge is Accused of Bias; Company That Lost $212 Million Verdict on Appeal Contends Donations to GOP Influenced Decision,* Akron Beacon Journal, Jan. 12, 2007, at B1. In that article, Judge Batchelder indicated, for the first time, that he was close enough to Meyerson to have visited with him at his home, and that while he was presiding over the appeal Judge Batchelder knew that Meyerson had been a witness in the case. *Id.*

Then, in an act that was unprecedented in Ohio's history, the entire Ninth District Court of Appeals recused itself *sua sponte*. The appellate court reasoned that its recusal was necessary to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the pubic the unquestioned neutrality of an impartial panel of judges. Dupre joined in Smart Media's motion and also moved for leave to file an untimely motion for reconsideration pursuant to Ohio App. R. 14. Chief Justice Moyer, a Republican, appointed a panel of three judges to preside over the matter. The panel consisted of two Republicans and one Democrat.

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[2] In the past, Respondents have contended that Meyerson was no longer the CEO of Telxon while the case was pending. While that may be true, Meyerson stayed on as a member of Telxon's board and later as a consultant. The exact date of his formal departure has not yet been established. However, SEC records that were cited below indicate that Meyerson was still affiliated with Telxon while the case was pending.

Although neither Dupre nor Smart Media were permitted to conduct discovery, a good deal of information came to light. The majority's recitation of the facts is as follows:

> Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and long standing contributor. At a time when Meyerson is said to have known about the pending litigation – as early as the spring of 2000 – Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during the calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign). During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives – prior to his elevation to the bench – Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's) home following receipt of the political

> contribution. That sum - $15,000 – is described as nearly one third of the total funds raised for Batchelder's House campaign for that election cycle.

Pet. App. at 5a.

Unfortunately, the majority of the appointed panel ignored both Dupre's due process argument and the issue of fundamental fairness and instead focused on "whether [Dupre and Smart Media] have a procedural avenue available to seek their requested relief." App. at 6a. Incredibly, the majority answered its own inquiry in the negative and concluded that there was no remedy for the denial of Dupre's right to an impartial tribunal. *Id.* at 6-8a. In doing so, the majority went so far as to create *ex post facto instanter* requirement that Dupre attach a motion to reconsider to his motion for leave to file the motion for reconsideration. *Id.* The panel's decision was along party lines.

As noted by the dissent, the majority's decision did not pass constitutional scrutiny under this Court's precedent:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision.

> Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to average man as a judge...not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.'
>
> Such a stringent rule may sometimes bar trial by judges who have not actual bias and who would do their very best to weight the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.'

Pet. App. at 11-12a, *citing Tumey,* 273 U.S. at 532, *In re Murchison*, 349 U.S. 133, 136 (1955); *and, Offutt v. United States*, 348 U.S. 11, 14 (1954).

The dissenting judge went on to note that the appellate panel's original decision, if left intact, amounted to "appellate nullification" and threatened the very foundation of the rule of law:

> A $212,000,000.00 plus judgment erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual since the inception of the case, creates a classic scenario giving rise to every nuance of political influence in our courts which calls for self-disqualification.
>
> ***

> [T]he multitude of factors present in these proceeding by which the judge's (judges') impartiality might reasonably be questioned are so strongly supportive of the appearance of impropriety they challenge Canons 3 and 4 and mandate self-disqualification lest appellate nullification joins jury nullification to avoid the effectiveness of our duly enacted laws.

Pet. App. at 18a-19a.

Dupre filed his second memorandum in support of jurisdiction with the Ohio Supreme Court stating, unequivocally, that it would be unconstitutional for Ohio not to have a remedy for a violation of his constitutional right to due process, and that the appointed panel's newly created *ex post facto instanter* requirement appeared to be the type of unprecedented and novel change in state law specifically designed to justify the denial of a citizen's constitutional rights. Dupre also noted that two of the four Justices who voted not to accept the case the first time had also received hundreds of thousands of dollars in campaign contributions from Meyerson, either directly or via campaign committees.

When neither Justice voluntarily recused him or herself, Smart Media filed a motion to have Chief Justice Moyer disqualify Justice Maureen O'Connor. *See,* The Supreme Court of Ohio, Case Information, Case No. 2007-2321, *available at* http://www.sconet.state.oh.us/clerk_of_court/ecms/resultsbycasenumber.asp?type=3&year=2007&number=2321&myPage=searchbyentityname.asp. Of particular concern were the following facts: (1) in 1998, Meyerson and his

family had given $52,000.00 directly to Justice O'Connor's campaign for Lieutenant Governor; (2) the Taft/O'Connor campaign received $218,900.00 from the Summit County Republican Party on December 21, 2001, or three months after Meyerson gave the Summit County Republican Party $212,500.00; (3) Justice O'Connor failed to disclose any of the contributions when she cast the deciding vote declining jurisdiction over the first appeal; and (4) O'Connor, Batchelder, and Arshinkoff all attended the August 29, 2007 Summit County Republican Finance dinner, all while Arshinkoff was staving off the coup attempt and the case was pending before the appointed panel. *Id.*

In addition to the contributions contained in Smart Media's motion, the press reported that Meyerson appeared to have contributed another $176,000.00 to Justice O'Connor for her 2002 Ohio Supreme Court race: "Meyerson also contributed $215,000 to the Republican National State Elections Committee, former Congressman Tom DeLay's elaborate laundering system, for which he was accused of violating election laws in 2005." Denise Grollmus, *Justice Maureen O'Connor Says Campaign Money Doesn't Affect Her*, Cleveland Scene Magazine, Mar. 19, 2008, at 11. "The committee then gave the money to the Ohio GOP, which in turn donated $176,000 to O'Connor. (Meyerson did not return *Scene*'s phone calls.)" *Id.* This sequence of events can be verified by public filings at the Ohio Secretary of State's web site. *Available at* http://www2.sos.state.oh.us/portal/page?_pageid=34,56478,34_56508&_dad=portal&_schema=PORTAL. All of the aforementioned contributions occurred during the pendency of the litigation. No formal ruling or order was issued regarding the motion

to disqualify Justice O'Connor. *See,* Supreme Court of Ohio, Case Information, Case No. 2007-2321, *supra.* However, Justice O'Connor did send an email to the Clerk of Court for the Ohio Supreme Court stating, without explanation, that she would not recuse herself. *Id.*

Justice O'Connor continued to be completely unfazed by the conflict of interest concerns arising from this case. After the appointed panel issued its decision, Justice O'Connor was reported to have sent attorneys who appeared at oral argument before the Ohio Supreme Court invitations to her fundraisers while their cases were pending before the Court. Grollmus, *supra*. In the first two months of 2008 alone, Justice O'Connor raised more than $200,000.00. *Id.* While Dupre's memorandum in support of jurisdiction was pending, Justice O'Connor also attended the Summit Republican's Lincoln Day dinner, which was hosted by Arshinkoff. Posting of Denise Grollmus to the Cleveland Scene Magazine, *Is the Ohio Supreme Court Rigged in Alex Arshinkoff's Favor? at* http://blogs.clevescene.com/cnotes/2008/03/is_the_ohio_supreme_court_rigg.php (Mar. 31, 2008, 05:37 EST). *At this public event,* Arshinkoff referred to Justice O'Connor as his "protégée" before complaining about the Ohio Secretary of State's decision to remove him from Summit County Board of Elections. *Id.* While at this event and while his case against the Secretary was pending before the Ohio Supreme Court, Arshinkoff asked Justice O'Connor whether she would make a decision based upon hearsay. *Id.* Justice O'Connor is reported to have smiled in response. *Id.*

On April 9, 2008, the Ohio Supreme Court declined to hear Dupre's appeal on the grounds that there was no "substantial" constitutional question. *See*, App. at 1a. No indication of how the Justices voted is contained in the order and only Chief Justice Moyer's signature is listed. *Id.* The Rules of Practice for the Supreme Court of Ohio indicate that an appeal that alleges "a substantial constitutional question" is a claimed appeal of right. Ohio S.Ct. Prac. R. II (1)(A)(2). In order for the Court to deny the appeal, as it did here, it must necessarily reject the appellant's argument that his constitutional rights were violated. *Id.* The Rules of Practice for the Ohio Supreme Court categorize truly "discretionary" appeals differently. *See*, Ohio S.Ct. Prac. R. II, § (1)(A)(3).

Meanwhile, Judge Batchelder announced that he is seeking to become Ohio's next Speaker of the House and recently indicated that he has donated $125,000.00 to the Ohio House Republican Caucus. *See,* Posting of Aaron Marshall to The Plain Dealer Politics Blog, *Ability to Raise Cash is Key in Winning Ohio House Speaker Post,* http://blog.cleveland.com/openers/2008/06/speaker.html (June 23, 2008, 00:20 EST). Petitioner William Dupre, a Chicago resident, stands before this Court astounded that such a series of events could occur within the United States of America.

REASONS FOR GRANTING THE PETITION

I. A right to an impartial tribunal is little better than no right at all when judges are free to preside over matters where parties have already contributed exorbitant sums to their campaigns, or where a party contributes large sums while the case is pending.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986), this Court held that a state supreme court justice who authored an opinion that consequently resulted in his recovery of $30,000.00 from a similar case crossed over "the outer boundaries of judicial qualification" established by Due Process Clause. *Id.* Dupre asks this Court to consider whether hundreds of thousands of dollars, if not millions, in the form of campaign contributions, "would offer possible temptation to the average...judge to... lead him not to hold the balance nice, clear and true." *Id.* at 822, *citing, Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Dupre does not ask this Court to conclude that any campaign contribution to any judge implicates a litigant's right to an impartial tribunal or requires disqualification. However, the opposite proposition, that campaign contributions, regardless of the amounts, timing, or manner in which they are made, can never cross over "the outer boundaries of judicial qualification" established by Due Process Clause, stretches reason beyond its limits. *Lavoie*, 475 U.S. at 828. In *Ward*, this Court concluded that a mayor's ability to raise revenue for his village disqualified him

from adjudicating cases involving minor traffic tickets. *Ward,* 409 U.S. at 60. This type of indirect benefit pales in comparison to the benefits that flow from a candidate's ability to have a readily accessible war chest. Not having to lend oneself campaign funds is a direct benefit to that candidate. A large reserve of funds for a campaign can discourage formidable opponents from entering a race against a candidate. The ability to hire a paid staff to undertake the work of a campaign directly benefits the candidate. Clearly the ability to obtain or retain a paid elected office is a direct benefit to the officeholder. Rarely, if ever, are these benefits available to a judicial candidate who does not receive campaign contributions.

Moreover, this Court has repeatedly noted that the reach of the Due Process Clause is not limited to those circumstances were actual bias is proven, but extends to those situations where the appearance of fairness is lacking. *See, In re: Murchison*, 349 U.S. 133, 136 (1955). Due process "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, ... by ensuring that no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also, Peters v. Kiff*, 407 U.S. 493, 502 (1972) (noting that "due process is denied by circumstances that create the likelihood or appearance of bias"). It cannot credibly be argued that either the case *sub judice*, or the general practice of litigants contributing vast sums to judges who have their cases pending before them, satisfy the appearance of fairness.

To recount: (1) the former Chairman of the Board and CEO ("Chairman") of one of the parties had a sizable pecuniary interest in the outcome of the litigation and was a key witness during discovery and trial; (2) the candidate who eventually became the authoring judge visited the Chairman's home in order to solicit a contribution; (3) the Chairman contributed $15,000 directly to that candidate, which constituted more than one third of the candidate's total contributions; (4) the Chairman then contributed over $650,000 to a county party between the time it was proven that the Chairman learned of the litigation and its conclusion on appeal; (5) those contributions made the Chairman the largest contributor to the county party; (6) the county party then contributed $20,000 to the authoring judge; (7) the county party was and is controlled by a serial political bully with a history of intimidating judges within his party (8) the case resulted in the largest verdict in the County's history; (9) while the case was on appeal, the judge who authored the appellate decision learned that the Chairman was a witness; (10) the judge who authored the appellate decision failed to disclose either his prior relationship with the Chairman or the contributions he received from the Chairman; (11) the Chairman contributed an additional $25,000.00 to the party's judicial fund weeks after oral arguments; (12) the judge authored a factually and legally erroneous decision that favored the Chairman's position; (13) the appellate court's judgment was decided by one vote; (14) on the day the decision was announced, the judge who authored the decision announced he was leaving the bench to run for the State House of Representatives; and (15) when the information was discovered and called to the attention of the appellate

court, the entire court recused itself from hearing Dupre's motions *sua sponte*.

At the state supreme court level, the following occurred: (1) the state supreme court initially declined jurisdiction by a vote of 4-3; (2) two of the justices who voted to decline jurisdiction received hundreds of thousands of dollars from the Chairman, directly, through committees or the state party, or via the serial political bully with a history of intimidating judges; (3) neither justice disclosed this information or offered to recuse him or herself; (4) after the information was discovered and the matter was again pending before the state supreme court, neither Justice voluntarily recused his or herself; (5) one of justice's made her decision known, not through a written opinion, but by way of an email to the state supreme court's clerk of court; and (6) notwithstanding all of the foregoing, and the fact that one of judges on the appointed panel found a constitutional violation, and the fact that the Oklahoma Supreme Court's decision in *Pierce* was presented to the court, the state supreme court declined jurisdiction a second time finding no substantial constitutional question. To describe this series of events as *appearing fair* to Dupre, or as even being *fair* to Dupre, would require the narrator to distort the English language beyond recognition.

This Court has indicated that individuals have a First Amendment right to make campaign contributions to candidates, and has implied that, although such contributions can impact a judge's impartiality, this right may extend to contributions to judicial candidates. *White,* 536 U.S. at 788-92. However, it would be a distortion of this Court's basic

reasoning in regard to such political activity to suggest that all contributions made to judges or judicial candidates are shielded from constitutional scrutiny by the First Amendment. Where, as is the case here, it appears as though contributions have been made in excess of established statutory limits, by a litigant through the use of committees or political parties, any presumption of legitimacy arising from the First Amendment cannot exist. *See,* Ohio Code of Judicial Conduct, Canon 7(C)(5)(a)(i) (Although the limits have been raised over the years, the 2008 version of the Canon establishes a $3,000.00 limit for individual contributions to Supreme Court candidates and a $1,000.00 limit for individual contributions to candidates for appellate courts).

While an individual might have the right to contribute to a candidate who shares the same general judicial philosophy, it does not follow that a party has a right to contribute large sums to a judge who is deciding that party's case. Indeed, from the perspective of the litigant, a candidate's general judicial philosophy places a distant second behind a judge's specific views regarding the pending matter. *See,* Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, The N.Y. Times, Jan. 29, 2008, at A14 (where Professor Palmer's study concluded that "[i]t's the donation, not the underlying philosophical orientation, that appears to account for the voting outcome.") Equally unpersuasive is the notion that a party has a First Amendment right to have the particular judge he or she heavily contributed to preside over the party's case. Finally, when the sums contributed to a judge become truly exorbitant, states should be required to ensure that the contributing

party's right to speech gives way to the opposing party's right to due process. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (ruling that "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.").

Implicitly recognizing the balance between these competing interests, at least one state supreme court has concluded that a judge's impartiality can reasonably be questioned based upon the circumstances surrounding the campaign contributions, and that where the judge's impartiality can reasonably be questioned, the judge's participation in the case amounts to a violation of the opposing party's right to due process. *Pierce,* 39 P.3d at 798. In *Pierce,* an attorney and the attorney's father both attended the presiding judge's fundraiser and contributed the statutory maximum, $5,000.00. *Id.* The question arises: if two $5,000.00 contributions can invoke the Due Process Clause in Oklahoma, then how can hundreds of thousands of dollars worth of contributions to the presiding judge or justice in Ohio, or millions in West Virginia, be constitutionally permitted? Unless this Court weighs in on the issue, the right to an impartial judge has deteriorated into a concept so uncertain that it is little better than no right at all.

II. This Court should hear the matter because neither Ohio, nor any other State, is free to deny a litigant his right to an impartial tribunal by denying him a procedural remedy through which he can enforce that right.

It is important to note that no judge on the appointed panel was willing to find that Judge Batchelder's prior participation in the case was appropriate or that the initial proceedings were fair to Dupre. Indeed, with the possible exception of Respondents' counsel, it would be difficult to find three individuals in all of Summit County who thought Judge Batchelder's participation in the case was appropriate or that the initial proceedings were fair to Dupre. Accordingly, the majority's conclusion, that Ohio had no remedy for these violations, cannot be an answer that comports with the requirements of the United States Constitution. *See*, *Lavoie,* 475 U.S. at 827-28 ("But we are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote."); *see also, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (observing that once it is determined that the Due Process Clause applies, the question of 'what process is due' is one answered by the United States Constitution); *Liljeberg v. Health Serv. Acquis. Corp.*, 486 U.S. 847, 868 (1988) ("If we focus on fairness to the particular litigants, a careful study of Judge Rubin's analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment... than there is of allowing a new judge to take a fresh look at the issues.").

Ohio is now the only state that has failed to provide a process for remedying a judgment authored by a judge who should not have heard the case and whose participation was material to the outcome. *See, Tesco American, Inc v. Strong Inds., Inc.*, 221 S.W.3d 550, 556 (Tex. 2006) (holding that a "judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified"); *see also, Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988) (where the entire Court vacated the initial decision and recused itself after discovering that the Justice who authored the initial opinion had a similar lawsuit); *Powell v. Anderson*, 660 N.W.2d 107, 122-23 (Minn. 2003) ("Although we can envision a case in which a disqualified judge's participation in an appellate panel was inconsequential enough that it would not infect the decision, this is not one of those cases."); *Pierce*, 39 P.3d at 799 ("Characterizing the error to disqualify as a violation of due process shows that the decree must be reversed.").

The majority of the panel not only failed to provide a procedural remedy to Dupre, it removed a procedural vehicle that already existed. *See*, Pet. App. at 6-8a. Ohio Appellate Rule 14(B) provides that a party may move *for leave* to file an untimely application for reconsideration if the party is able to demonstrate extraordinary circumstances. The majority as much as admitted that Dupre had established extraordinary circumstances, but then added a requirement not found in existing law. *Id.* Dupre did not file an untimely application for reconsideration because he had not been granted leave not file to file an untimely application for reconsideration. The reason the

majority claimed that Dupre could not have leave to file an application for reconsideration is that he did not "explain" why the case should be reconsidered. *Id.* The missing explanation would have been set forth in the application for reconsideration (which Dupre never received leave to file). That is the entire function of such a pleading.

After announcing the creation of this *ex post facto instanter* requirement, the majority did not then provide Dupre with an opportunity to explain why the case should be reconsidered. Instead, the majority ruled that Dupre's failure to divine the majority's unprecedented requirement was fatal. *Id.* This type of procedural chicanery cannot survive even the most cursory review of this Court's precedent. "[A] State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 682 (1930); *see also, Harper v. Va. Dept. of Taxn.*, 509 U.S. 86, 101 (1993).

If this Court has any doubt as to whether the majority truly believed a constitutional violation occurred below, it need only compare the gamesmanship employed by the majority with the actions of other state courts during the civil rights era. *See, Williams v. Georgia*, 349 U.S. 375, 389 (1955) ("Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to the motion does not deprive this Court of jurisdiction to find that a substantive issue is properly before us.");

NAACP v. Alabama, 377 U.S. 288, 297 (1964) ("The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form."); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

If this Court desires further evidence that Dupre's due process rights were violated, it need look no further than the majority's decision below. The majority could have expressly stated that the initial proceedings did not violate Dupre's right to an impartial tribunal. The majority remained silent on that issue. The majority could have said that Dupre did not meet his burden of proof in moving to vacate the Ninth District Court of Appeal's original judgment. Instead, the majority concluded that a motion to vacate a judgment was not available at the appellate level. The majority could have claimed that Dupre failed to demonstrate the "extraordinary circumstances" required by the language of Ohio App. R. 14(B). *Id.* The majority declined to do so. Rather, the majority speculated that Dupre would be unable to establish why the original decision was wrongly decided, without giving Dupre the opportunity to do so.

If the majority's decision can be read to reveal anything, it can be read to reveal that no judge on the appointed panel thought the initial proceedings comported with the general principles of fairness, due

process, or the appearance of justice. Having reached that conclusion, it was constitutionally impermissible for the Ohio court to conclude that Ohio did not have a remedy for the violation of Dupre's constitutional rights.

III. The Court should hear this matter because the current practices can only be expected to grow worse without this Court's intervention, and the public's faith in the judiciary is being destroyed.

When it comes to the practice of contributing large sums to judges who hear litigants' cases, the conduct of the litigants and judicial candidates grows ever more brazen without this Court's intervention. On October 10, 2000, the Ohio Chamber of Commerce issued a press release wherein it noted that "[i]n 75 cases where the Ohio Academy of Trial Lawyers (OATL) filed "friend of the court" briefs urging the court to take an action, the justices who received the most money from the trial attorneys voted overwhelmingly with the OATL position." Press Release, Ohio Chamber of Commerce, Chamber Study Shows Correlation Between Trial Lawyer Contributions, Supreme Court Decisions (Oct. 10, 2000), *available at* www.ohiochamber.com /Events/news_chamberstudy.asp. Had the Chamber raised its concerns with this Court then, Dupre may not be here today. However, the Chamber chose a different route.

In 2000, the Chamber formed an unregistered PAC known as Citizens for a Strong Ohio which spent $4.2 million for television advertising accusing a justice of

changing her votes based on campaign contributions. Editorial, *The Sleaze Merchants*, Toledo Blade, June 17, 2006, at A8. The Chamber eventually faced contempt charges after refusing to identify the donors who contributed the funds that paid for the advertising. Jim Provance, *High Court Disallows Appeal for Television Ad Privacy*, Toledo Blade, Dec. 28, 2004, at A1. The Chamber's conduct eventually became the subject of national scrutiny. Terry Carter, *Mud and Money*, 91 A.B.A.J. 40, Feb. 2005 (noting that the "[C]hamber is unrepentant in what it believes is a battle against waves of litigation that harm its members").

The Chamber's efforts continued throughout 2006, wherein it formed a new PAC, The Partnership for Ohio's Future. Rob Modic, *Law Firms Play Key Roles in High Court Campaigns*, Dayton Daily News, Oct. 21, 2006, at A6. The Partnership spent $1.28 million on advertising in favor of its two favorite choices, Justice Terrence O'Donnell and candidate Robert Cupp. *Id.* After asking "what happened to the spending limits," Justice O'Donnell's opponent was reported to have answered his own question: "These are only illegal money laundering operations." *Id.* By the end of 2006, the Chamber had obtained its desired result. The New York Times reported that Justice O'Donnell, who won reelection that year, voted with his contributors 91% of the time. Adam Liptak, *Campaign Cash Mirror's a High Court's Rulings,* N.Y Times, Oct. 1, 2006, at A1. In that article, Justice Paul Pfeifer summed up the state of affairs in Ohio for the national audience: "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." *Id.* "Everyone interested in

contributing has very specific interests." *Id.* "They mean to be buying my vote."[3] *Id.*

Now, if the only two groups of people who entered civil courtrooms in Ohio were wealthy trial lawyers and consortiums of publicly traded corporations, then perhaps the axiom that turnabout is fair play would be applicable. However, the vast majority of citizens subject to the process are neither wealthy trial lawyers nor publicly traded companies. These individuals, and small businesses, have their constitutional rights obliterated by the cross-fire that arises from the tactics employed by these moneyed goliaths. This is a result that cannot continue, lest the individual's constitutional right to an impartial tribunal is reduced to a mere aspiration.

Even if voter approval of a candidate provided an exception to the Fourteenth Amendment's prohibition against unconstitutional conduct by a state actor (and it does not), the voters are not really presented with such a decision. The voter's choice is rarely between a judicial candidate who is beholden to contributors and

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[3] While it is permissible for both the press and Justices to speak out as to the system's ills, being critical of the system as an opponent of one of the Justices will earn you a trip to the Office of the Disciplinary Counsel. *See, O'Neil v. Coughlin* 511 F.3d. 638, 640 (6th Cir. 2008). In *O'Neil*, the Sixth Circuit reversed a district court's order enjoining the enforcement of three canons of the Ohio Code of Judicial Conduct. *Id.* The Court concluded that disciplinary proceedings against O'Neil could go forward notwithstanding the fact that two of the complaints stemmed from O'Neil's identification of his party affiliation and his action of "wrongfully [attacking] the credibility of the Ohio judiciary." *Id.*

a candidate who does not take contributions from attorneys and litigants. All too often, the voter's decision is between two candidates both of whom have received large contributions from attorneys and/or litigants who will appear before that candidate. Any argument that the citizens of Ohio approve of this process is spurious. A 2002 poll conducted by the League of Women Voters indicated that 83% of voters believed that "campaign contributions influence judges and candidates more than any other factor." *See*, Ohio Voter, Judicial Independence Project (The League of Women Voters of Ohio, Columbus, Ohio), Summer 2002, *available at* http://www.lwvohio.org/Voter%20 Newsletters /VOTER%20Summer%202002.pdf; *see also*, OhioImpact.org, Judicial Reform: Ensuring an Independent and Impartial Judiciary, http://www.ohioimpact.org/judicial-reform (last visited July 6, 2008). Two thirds of the voters believed that Ohio needed to undertake judicial reform. *Id.*

The problem of course is that voters do not write Ohio's Code of Judicial Conduct. The very individuals who are capable of reforming the system are those who stand to lose much by doing so. This sentiment has been articulated by legal professionals within Ohio for years: "[A]lthough there may be no good method of selecting and retaining judges, there is a worst method, and Ohio is among the states to have found it." Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 Cap. U. L. Rev. 455, 472 (2002). "That worst method is one in which judges qualify for their jobs by raising very large sums of money from lawyers, litigants, and special interest

groups, and retain their offices only by continuing to raise such funds." *Id.*

While this matter presents perhaps the most dramatic violation of a litigant's right to due process resulting from campaign contributions, it would be a mistake to suggest that Dupre is alone in suffering this type of constitutional injury. *See, White*, 536 U.S. at 789 (noting that Alabama, Pennsylvania, and Texas all suffered from the same maladies that afflict Ohio). Since *White*, the supreme courts of Illinois and West Virginia have joined the proverbial club of States where wealthy contributors have supported judicial candidates who eventually overturned large judgments levied against those contributors. *See, e.g., A.T. Massey,* 2008 W.Va. LEXIS 22, *see also,* Carter, *supra*. ("In November, Illinois upstaged [O]hio in what critics call the race to the bottom.")

The violence that this type of conduct unleashes upon the public's faith in the system cannot be overstated. More than 70 percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom, according to a 2004 opinion survey conducted by Zogby International. *Americans Speak Out on Judicial Elections*, Justice at Stake Campaign, March 2004 Survey Highlights, http://faircourts.org/files/ZogbyPoll FActSheet.pdf. As a result, 79 percent of the registered voters polled believe that "[j]udges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaigns." Greenberg Quinlan Rosner Research & American Research Inc., Justice at Stake Frequency Questionnaire (2001) at p. 10, question 70, *available at*

http://www.gqrr.com/articles/1617/1412_JAS_ntlsurvey.pdf. The viewpoint expressed by the public is not limited to laypersons. According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half of the judges surveyed (46 percent) themselves believe that campaign contributions to judges influence their decisions. Greenberg Quinlan Rosner Research & American Research Inc., Justice at Stake State Judges Frequency Questionnaire (2001) at p. 11, question 31, *available at* http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf. As a result, more than 55 percent of state court judges believe that they "should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." *Id.* at 11.

Both the press and a former member of this Court have joined the chorus of those who believe that the state judicial systems can no longer credibly sustain themselves in this fashion. In April of this year, Justice Sandra Day O'Connor cut to the heart of the issue: "We put cash in the courtrooms, and it's just wrong." *See*, Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'* The N.Y. Times, April 15, 2008, at A22. In an editorial in Parade Magazine, Justice Sandra Day O'Connor observed that the current system made it difficult to conclude that the victorious candidates were in fact fair and impartial. Justice Sandra Day O'Connor, *How To Save Our Courts*, Parade Magazine, Feb. 24, 2008, at 4. "When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial." *Id.* The national press has joined the local

publications in decrying the flaws in the state judicial systems. *See, e.g.*, Robert Barnes, *Judicial Races Now Rife With Politics*, The Washington Post, Oct. 11, 2007, at A01.

This Court has noted that the public's faith in the rule of law is the foundation of the system and that the appearance of impartiality provides legitimacy for the judicial branch of the government. *See, e.g., N.Y. State Bd. of Elections v. Lopez Torres,* 128 S. Ct. 791, 803 (2008) (Kennedy concurring)("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges."), *see also, Mistretta v. United States*, 488 U.S. 361, 407 (1989). When the public, the press, and a former Justice of this Court are openly questioning both the impartiality of state court judges and the application of the rule of law, how long can the state court systems continue to effectively function? How long will it be before prudent attorneys, who are not able to contribute large sums, begin filing in or removing every eligible action to federal court?

While the public's faith in, and the continued functionality of, the state court systems are compelling reasons to grant Dupre's Petition, they are not the best reasons. The critical reason for this Court to accept jurisdiction is that if it does not, no other institution will prevent violations of due process that will be suffered upon many more citizens throughout the States. The President has no constitutional ability to address the issue. Congress has declined to exercise whatever power it may have in accordance with the Fourteenth Amendment. So the people suffer while,

with one exception, the various state supreme courts publically lament over the inequities of the current judicial systems but do nothing to change them. Again, it is not in their perceived interests to do so. If judicial candidates have to disqualify themselves from matters involving their biggest contributors, then their biggest contributors will cease contributing large sums.

The Framers contemplated the reality that officeholders would often act out of their own self interest. *See, Morrison v. Olson*, (1988), 487 U.S. 654, 698 (Scalia dissenting) ("But just as the mere words of the Bill of Rights are not self-effectuating, the Framers recognized the '[i]nsufficiency of a mere parchment delineation of the boundaries' to achieve the separation of powers."), *citing*, Federalist No. 73, p. 442 (A. Hamilton). This is also why the separation of powers includes the separation of power between the state and federal systems. Indeed, diversity jurisdiction of the federal courts exists precisely because of the concern that citizens of one state might not be treated fairly by judges of a separate state. The Federalist No. 80 (A. Hamilton) ("The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself."); *see also, Bank of the U.S. v. Deveaux,* 9 U.S. 61, 87 (1809) ("However, true the fact may be, that the tribunals of states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehension on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of

controversies between alien and a citizen, or between citizens of different states.")

Here, Dupre, a resident of Chicago, Illinois, had Ohio's forum selected for him by a *de facto* defendant posturing as a putative plaintiff via a declaratory judgment action. He did not contribute to the judicial candidates for the Ohio courts. He had no democratic say as to how Ohio's campaign finance laws were written or enforced. Dupre had absolutely no input into the contents of the Ohio Code of Judicial Conduct.

Long ago, this Court recognized its constitutional ability, even its obligation, to direct State actors to comply with the United States Constitution in order to protect the citizens of the United States. *See, Cooper v. Aaron,* 358 U.S. 1, 18 (1958) ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); *see also, Baker v. Carr*, 369 U.S. 186, 226 (1962) (rejecting a "political question" argument and concluding that "[t]he question here is the consistency of the state action with the Federal Constitution.") The practice of judges and justices presiding over cases where one of the litigants has contributed exorbitant sums to their campaigns can be argued to be historically recent. However, in terms of real time, the practice has been ongoing for more than a decade and grows worse with every passing year. In response to this trend, Dupre implores this Court: Please, wait no more. Dupre needs this Court to hear the matter lest his constitutional right to an impartial tribunal be discarded as an aspiration without the force of law. The people need *their* Court to stop the sale of justice. For, if this Court will not, no other institution will.

CONCLUSION

This case represents the rarest of cases where only this Court has the ability to preserve and protect Dupre's rights afforded by the United States Constitution. It should grant Dupre's petition and issue a writ of certiorari.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2007-2321

[Filed April 9, 2008]

Telxon Corporation et al.	)
	)
v	)
	)
Smart Media of Delaware, Inc., et al.	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Summit County Court of Appeals; Nos 22098 and 22099)

/s/
THOMAS J MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
STATE OF OHIO
COUNTY OF SUMMIT

C.A. Nos 22098 & 22099

[Filed November 5, 2007]

TELXON CORPORATION, et al.	)
Appellants	)
	)
v.	)
	)
SMART MEDIA OF DELAWARE, INC., et al.	)
Appellees	)
	)

JOURNAL ENTRY

Appellees Smart Media and Dupre have moved this court, pursuant to Civ.R. 60(B), to vacate the decision and journal entry, which was journalized on September 25, 2005 and which reversed a trial court judgment and damage award. The Appellants have responded in opposition. Appellee Dupre also has moved for leave to file an untimely motion for reconsideration. Upon consideration, for the reasons set forth in the attached opinion, both motions are denied.

/s/ _____
Judge

/s/ _____
Judge

A brief recitation of the procedural facts is in order. During 1998, Appellant Telxon filed suit against Appellee Smart Media, seeking a declaration that there was no binding agreement between the two companies. Smart Media joined other defendants, including Appellee Dupre, and all of the defendants filed counterclaims. They alleged various counterclaims, including breach of contract, fraud, and interference with a business relationship. Appellant Symbol Technologies was later joined as a defendant to the counterclaims.

The case eventually proceeded to a jury trial, which culminated in a judgment against Telxon and Symbol and in favor of the counterclaimants, with a total damage award in excess of $218 million. Telxon and Symbol appealed and this court reversed the judgment on the counterclaims. This court held that the judgment should be reversed because, among other reasons, there was not enough evidence to support any of the counterclaims and Telxon and Symbol should have been granted directed verdicts. Smart Media and Dupre appealed to the Ohio Supreme Court, but the Court declined to accept jurisdiction.

On January 9, 2007, Appellee Smart Media filed a motion with this court to vacate the judgment pursuant to Civ.R. 60(B). Appellee Dupre later joined in that motion. The motions of each Appellee urged

that this court vacate its decision in this case due to the "unacceptable appearance of impropriety and possible bias." They alleged that, unbeknownst to either of the Appellees at the time, Robert Meyerson, who had been the CEO of Telxon and had a financial stake in the outcome of this case, had strong political ties to the Summit County Republican Party and directly to Judge William G. Batchelder, the author of the opinion. Appellees asserted that over a period of years, Meyerson had made substantial financial contributions to Judge Batchelder and his political party both locally and statewide. In addition to Judge Batchelder's financial ties to Meyerson, Appellees alleged other surrounding factors that tended to create an appearance of impropriety, which included: (1) the opinion itself, in which only one of the other two panel judges concurred, which was unnecessarily lengthy and written in a tone that does not appear to be unbiased; and (2) the fact that Judge Batchelder left the bench shortly after the decision to pursue an elected position in the legislative branch of government. Given the additional facts that the trial court's damage judgment for Smart Media and Dupre had been historically large and that this court reversed the judgment and entered final judgment for the appellants, Smart Media and Dupre contend that the totality of the circumstances of this case conveys a strong appearance of impropriety.

All of the sitting judges of the Ninth District Court of Appeals have recused themselves and the matter is now before this panel of visiting judges pursuant to assignment by the Chief Justice of the Ohio Supreme Court.

THE SPECIFIC ALLEGATIONS

According to the allegations of the Appellees, Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and longest-standing political contributor. At a time when Meyerson is said to have known about the pending litigation—as early as the spring of 2000—Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign.) During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives—prior to his elevation to the bench—Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's) home following receipt of the political contribution. That sum—$15,000—is described as nearly one-third of the total funds raised for Batchelder's Ohio House campaign for that election cycle.

PROCEDURAL ISSUES AND MECHANISMS

We must initially address whether Telxon and Dupre have a procedural avenue to seek their requested relief. Telxon moved to vacate judgment pursuant to Civ.R. 60(B) and Dupre joined in that motion. Although Civ.R. 60(B) may be used in original actions in the courts of appeals, the Ohio Supreme Court has held that "Civ.R. 60(B) is clearly inapplicable to review the court's judgment on appeal." *Martin v. Roeder* (1996), 75 Ohio St.3d 603.

The Supreme Court has held for many years that the civil rules generally do not apply to appeals. "Under ordinary circumstances, neither the Ohio Rules of Criminal Procedure nor the Ohio Rules of Civil Procedure are applicable to cases on appeal; the Appellate Rules 'govern procedure in appeals to courts of appeals from the trial courts of record in Ohio.'" *State v. McGettrick* (1987), 31 Ohio St.3d 138, 141, fn. 5, citing App.R. 1, Crim.R. 1(C)(1), and Civ.R. 1(C)(1).

App.R. 1(A) provides that the appellate rules govern procedure in appeals to the courts of appeals. Civ.R. 1(C) further provides that the civil rules do not apply upon appeal "to the extent by their nature they would be clearly inapplicable." Because App.R. 26 provides for an application for reconsideration from an appellate decision, the *Martin* court concluded that it provided the exclusive remedy for the losing party on appeal and that Civ.R. 60(B) was inapplicable. Id.

This appellate panel cannot ignore the clear precedent of the Ohio Supreme Court. We have no authority to address the merits of Telxon and Dupre's

motion for relief from judgment pursuant to Civ.R. 60(B). The motion for relief from judgment is overruled accordingly.

Appellee Dupre has also requested leave to file an untimely application for reconsideration of this court's September 25, 2005 judgment. The justification for granting leave, and for considering reconsideration on its merits, is the belief that extraordinary circumstances have been alleged—thus permitting the application for an untimely motion under Appellate Rule 14(B). See, e.g., *Carroll v. Feiel* (1981), 1 Ohio App. 3d 145.

However, even if this court were to consider an Appellate Rule 26(A) reconsideration on its merits, the standard for the ultimate ruling is different from an ab initio examination of the appeal on the merits. The test is whether the application raises an obvious error in the court's original decision or raises an issue that was either not considered at all or not fully considered in the original opinion. *State v. Black* (1991), 78 Ohio App.3d 130, 132; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 68. An application for reconsideration is not an opportunity to reargue the merits of a party's case; rather, the party moving for reconsideration bears the burden of pointing to the alleged deficiencies in the appellate court's earlier decision. See *State v. Vrabel* (Oct. 6, 2000), 7th Dist. No. 95 CA 221. These limitations on the breadth of such reconsideration may well be the reason why appellee Telxon did not even join in the request for leave. Furthermore, we do not have the authority to disqualify a judge for an alleged violation of an appearance standard. That authority rests with the Chief Justice under the Ohio

Constitution. See Section 5(C), Article IV, Ohio Constitution.

But, even if an untimely application for reconsideration were procedurally available, the mere granting of leave to file an untimely motion would not, in itself, set aside the existing judgment. Although Appellee Dupre has maintained that extraordinary circumstances exist to justify granting leave to file an untimely application, he has failed to allege that he could demonstrate any legal deficiency in the appellate judgment if leave were granted. Accordingly, the request to file an untimely application for reconsideration is denied.

NADER, J.
DISSENTS, SAYING:

The Supreme Court of Ohio has identified the purpose of Civ.R.60(B) as "affording relief in the interest of justice." *Moore v. Emmanuel Family Training Center, Inc.* (1985), 18 Ohio St.3d 64, 67, fn.1. The Court has also declared, on multiple occasions that "Civ.R. 60(B) is a remedial rule that is to be liberally construed with a view for effecting a just result." *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. Of Elections (1993)*, 67 Ohio St.3d 134, 136; see, also, *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21; *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 685. The basic authorization for using the rule is found in its first sentence: "On motion and *upon such terms as are just,* the court may relieve a party or his legal representative from a final judgment, order or proceeding***." (Emphasis added).Civ.R. 60(B). For the reasons that follow, I believe the

underlying motion is properly before this court and the terms of the motion demonstrate relief is necessary for a fair and equitable resolution of the underlying matter. In short, I would hold the motion should be granted to avoid the appearance of impropriety.

Initially, I acknowledge that the rules of civil procedure generally have no application to procedure in courts of appeals. "The Rules of Appellate procedure govern appeals from trial courts of record to courts of appeals in Ohio." *Martin v. Roeder,* 75 Ohio St.3d 603, 1996-Ohio-451. Not coincidentally, Telxon points out that *Martin* stands for the proposition that Civ.R. 60(B) is clearly inapplicable to review a final judgment of the court of appeals. Id. Telxon's assertion is generally accurate; however the holding in *Martin* cannot be read in a vacuum. A review of the basic facts and circumstances of *Martin*, in conjunction with a careful application of established rules of interpretation, demonstrates its ruling is not as sweeping as Telxon proposes.

In *Martin*, the appellant, a pro se inmate, filed a complaint in the Marion County Court of Common Pleas against the appellee, Marion Correctional Institution, alleging violations under Section 1983. Summary judgment was rendered in appellee's favor. The Third District Court of Appeals affirmed the holding.

Later, the appellant filed a motion for relief from the appellate court's judgment pursuant to Civ.R. 60 (B). The Court of Appeals overruled the appellant's motion holding that Civ.R. 60 (B) was inapplicable to appellate proceedings.

In affirming the Third District's determination, the Supreme Court held, per curiam, that Civ.R. 60 (B) is outside the scope of appellate proceedings. The Court pointed out that the rules of appellate procedure, in particular a motion for reconsideration pursuant to App.R. 26(A), are the only recourse from a judgment rendered by an appellate court on appeal.

S.Ct.R.Rep.Op. 1(B)(1) provides that, "[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including its footnotes." *Martin* was an opinion rendered per curiam, i.e. "by a majority of the court(,)" S.Ct.R.Rep.Op. 1(B)(3), but, contains no syllabus. Accordingly, the text of *Martin* sets forth the Supreme Court's specific holding.

Upon careful review of the text, the holding in *Martin* is narrow, limited to facts where an appellant, pursuant to Civ.R. 60 (B), attempts to seek relief from the judgment of an appellate court deciding an appeal from the judgment of a trial court. The factual and legal scenario adjudicated by the court in *Martin* is therefore fundamentally distinguishable from the issue presented in the matter sub judice.

Here, it is clear that we are considering a motion which does not address the merits of the appellate court's judgment relating to the direct appeal but, to the impropriety of a judge (or judges) sitting on the appeal. The issues animating appellees' motion emanate from facts, unrelated to the appeal but directed to disqualification of a judge, discovered subsequently to all substantive or procedural matters addressed by the trial court and, obviously, not

included in the record; the direct appeal in this matter was heard and concluded. The issues raised in appellees' motion are not part of the appeal from the trial court and not exclusively subject to appellate rules.

The motion under consideration does not address the trial court's judgment on appeal or the appellate judgment on that appeal; nor does it ask the Supreme Court to disqualify the judges per R.C. 2701.03, an action exclusively within the authority of the Chief Justice. This motion challenges the Ninth District's ruling on constitutional and ethical grounds as an "error or omission" of the Court of Appeals in violation of Canons 3 and 4 of the Code of Judicial Conduct:

> Canon 3(E)(1) provides "A judge shall disqualify himself*** in a proceeding in which the judge's impartiality might reasonably be questioned. ***" and,
> Canon 4:
> "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

The Fourteenth Amendment to the Constitution of the United States affords all residents due process to "give them equal protection of the laws and the right to have their case fairly tried in a public tribunal." *In re Oliver* (1948), 333 U.S. 257. In *In re Murchison* (1955), 349 U.S.133, the United States Supreme Court, in an opinion by Justice Black, stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course,

> requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge. . . not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.'" Id. At 136, quoting *Tumey v. Ohio*, 273 U. S.510, 532.

Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States* (1954), 348 U.S. 11, 14." *In re Murchison,* supra.

Rule 1 of the Local Rules of the Ninth Appellate District sets forth "***on appeal when the Ohio Rules of Appellate Procedure or these local rules cannot be applied, the Ohio Rules of Civil Procedure will apply, unless they are clearly inapplicable." eff. 7-1-98. With this in mind, the Supreme Court of Ohio has observed "[a] judge's participation in a case which gives rise to the appearance of impropriety and possible bias could constitute grounds for relief from judgment under Civ.R. 60 (B)(5)." *Volodkevich v. Volodkevich* (1988), 35 Ohio St. 3d.152, 154.

Civ.R. 60 (B) reads in relevant part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons***

"(5) any other reason, justifying relief from the judgment."

In *State ex rel. Gyurscsik v. Angelotta,* (1977) 50 Ohio St.2d 345, 346, the Ohio Supreme Court, in a per curiam opinion, pointed out that Civ.R.60(b)(5)" *** "is characterized ***as reflecting the inherent power of the court to relieve a person from the unjust operation of a judgment" and "[i]t is generally held that court errors and omissions are reasons justifying relief under the 'other reason' clause." Id. at 346-347.

In *Klapprott v. United States,* (1949) 335 U.S. 601, 614, modified, 336 U.S. 942, Justice Black pointed out that Civ.R.60(B)(5) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

In the motion before this court, appellees detailed the following undenied allegations supported by documentary exhibits:

(1) Robert Meyerson	(a) was Chairman and CEO of Telxon, located in Fairlawn, Ohio;

(b) is a substantial shareholder in Symbol; and,

(c) is an important witness in the trial.

In 1996, the Meyerson family contributed a total of $15,000.00 to Judge Batchelder in his campaign for the Ohio House of Representatives, 30% of his total post-primary contributions that year.

(2) During the pendency of the underlying case (December of 1998 through September 21, 2005), the Meyersons contributed nearly $1,000,000.00 to the Summit County Republican Party, including its Judicial Fund.

(3) In 2000, the year Judge Batchelder was seeking election to this court, the Meyersons wrote $460,000.00 dollars in checks to the Summit County Republican Party, at one fund raiser, benefitting both its General Fund and its Judicial Fund. Further, in 2000, Mr. Meyerson, with his wife, were the 12th highest contributors to state Republican Party organizations nationally. The Meyersons had personally contributed $290,000.00 to the Ohio and Florida Republican Parties.

(4) $25,000.00 of the Meyersons' total contributions to the Summit County Judicial Fund, in 2004, was given at the annual Summit County Republican fund raiser, within weeks after the appellate oral arguments in the underlying matter.

(5) The Meyersons have historically provided significant campaign contributions to may elected political officials including former Governor Taft, who first appointed Judge Batchelder to the Ninth Appellate District, and President Bush, who makes federal judicial appointments.

The alleged "error or omission" raised in appellee's motion is Judge Batchelder's failure to comply with Canon 3 and Canon 4 of the Code of Judicial Conduct. "[C]anons and accompanying text 'establish mandatory standards unless otherwise indicated.'" *Volodkevich, supra*, at 154, quoting the preface to the Code of Judicial Conduct. Although this motion only includes the writing judge, it also applies to the entire panel. The "Code" is binding, the facts compulsory, and the Canons mandatory. At the very minimum, disclosure to the parties of Meyerson's impressive political contributions and their potential for the appearance of impropriety was an absolute ethical mandate within the principles of Canons 3 and 4.

"The proper test for determining whether a judge's participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis,* 105 Ohio St.3d 1239, 2004-Ohio-7359, ¶8, citing Canon 3 (E) (1) of the Code of Judicial Conduct.

The previously undiscovered facts call into question the presumptive neutrality enjoyed by an impartial judge. Accordingly, the instant motion invokes the

original jurisdiction of this court per Article IV, Section 3 (B)(1)(f) of the Ohio Constitution, which provides:

"The courts of appeals shall have original jurisdiction *** (I)n any cause on review as may be necessary to its complete determination."

Appellees have sought this court's review of an issue originating in this court; an issue of which justice demands consideration for purposes of a "complete determination."

Considering the allegations set forth in their motion, I would hold appellees have demonstrated a reasonable appearance of impropriety to the extent the allegations cast doubt upon the impartiality of the judgment rendered by this court in its September 21, 2005 decision. Given the peculiar and extraordinary facts alleged in the motion, our careful attention to appellees' allegations is necessary for a complete and equitable determination of the case. Various opinions by the Chief Justice of the Ohio Supreme Court support such a conclusion.

In *In re Disqualification of Celebrezze,* 105 Ohio St.3d 1241, 2004-Ohio-7360, Chief Justice Moyer disqualified all judges in Cuyahoga County from sitting on a matter where the defendant, in a divorce case, was a county officeholder with "significant personal and professional connections to many judges in the county." Id. At 1242. The Chief Justice acknowledged that Judge Celebrezze testified, via affidavit, that he was prepared to address the matter fairly and impartially. Notwithstanding Judge

Celebrezze's esteemed testimony, the Chief Justice determined:

> "Judge Celebrezze and the other judges of Cuyahoga County should be disqualified from participation in the case. Though none of Judge Celebrezze's words or actions suggest that he is biased or prejudiced, this is a case in which his removal is necessary 'to avoid even an appearance of bias, prejudice, or impropriety, and to ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge.' *In re Disqualification of Floyd,* 101 Ohio St.3d 1215, 2003-Ohio-7354, at ¶10. As this court first said more than seven decades ago, 'it is of vital importance that the litigant believe that he will have a fair trial.' *State ex. rel. Turner v. Marshall* (1931), 123 Ohio St. 586, 587. The participation in this case by any Cuyahoga judge might reasonably cause the parties and the public to question the fairness of the proceedings." *In re Disqualification of Celebreeze*, supra, at ¶4.

As a result of the concerns for the appearance of impropriety prohibited by Canon 4, the Chief Justice resolved to appoint a visiting judge from outside Cuyahoga County to hear the matter.

Moreover, in a similar matter, the Chief Justice again underscored the importance of avoiding even the appearance of impropriety and the neutrality of the judiciary: "Those same concerns [animating the decision in *In re Disqualification of Celebreeze*] underlie my decision in this case. No one has

suggested that Judge Corrigan has said or done anything reflecting bias or prejudice for or against any of the parties to this case. Nonetheless, plaintiff Hagan is a county commissioner who necessarily exercises considerable authority over the budget of the common pleas court in Cuyahoga County. The public could reasonably question whether any judge now serving on the court of common pleas in Cuyahoga County would be able to render a decision based solely on the relevant facts and the law applicable to those facts." *In re Disqualifications of Corrigan,* 110 Ohio St.3d 1217, 2005-Ohio-7153, at ¶6.

One can debate both sides of the proper use of the Civil Rules by distinguishing cases and the uses of Civ.R. 60 (B)(5). However, Civ.R. 60(B)(5) is remedial in nature and therefore should be used to achieve equitable and just results. As the underlying vehicle is in original motion, this court is empowered to use this remedial rule to assure justice. Failing to do so merely supports a simplistic and strained rigidity in the employment of the civil rules towards the end of validating a judgment from a judge and panel who clearly and without hesitation should have complied with the mandatory dictates of Canon 3 and Canon 4 and disqualified themselves, sua sponte, as the entire court subsequently did, due to the overwhelming appearance of impropriety that could be drawn by a reasonable person.

A $212,000,000.00 plus judgment erased on appeal by a panel whose local political party received approximately $1,000,000.00 in contributions from a very financially interested individual since the inception of the case, creates a classic scenario giving

rise to every nuance of political influence in our courts which calls for self-disqualification. Meyerson and his associated entities contributed vast amounts of money for years to persons directly associated with this action and every local, state, and national office holder with authority and position to affect judicial careers of those serving in the Ninth District. This must suggest to a reasonable and objective observer a greater test of the integrity of the court than potential favoritism to another county employee. This most assuredly falls within the commendable purpose of Chief Justice Moyer's disqualification of every judge in Cuyahoga County to prevent the appearance of impropriety and restore confidence in an independent judiciary.

One can only surmise another's ultimate intentions, for that knowledge is privy to that person alone. No suggestion or conclusion is proffered herein about the impropriety of any of the parties involved. To the contrary, the presumption of their propriety has not been compromised by actual evidence of bias; however, the multitude of factors present in this proceeding by which the judge's (judges') impartiality might reasonably be questioned are so strongly supportive of the appearance of impropriety they challenge Canons 3 and 4 and mandate self-disqualification lest appellate nullification joins jury nullification to avoid the effectiveness of our duly enacted laws.

Given the totality of the circumstances and unusual context of the underlying motion, recognition that the Supreme Court has not formally barred the use of a Civ.R. 60(B) motion under these circumstances, and past rulings of the Chief Justice pertaining to disqualification of active and retired judges, I would

hold appellees' motion to be well taken, set aside the judgment, and order a rehearing of the appeal.

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No. 08-41

Supreme Court, U.S.
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AUG - 8 2008
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In the Supreme Court of the United States

WILLIAM DUPRE,

Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner failed timely to invoke the reasonable procedural mechanism provided by Ohio law for claiming bias of an appellate judge.

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This case presents no grand questions of due process, the effect of campaign contributions on judicial impartiality, or conflicting rules of law among the several states. It simply involves the unobjectionable requirement under Ohio law that a litigant raise a claim of judicial bias in a timely fashion. Petitioner failed to do so. Further, even if Dupre had not defaulted his claim in state court, the claim is so factually tenuous that it provides a poor vehicle for this Court to consider the constitutional implications of campaign donations of judicial candidates. This Court should deny certiorari.

STATEMENT

Petitioner William Dupre alleges that he is a victim of "appellate nullification" (Pet. 11), and raises the specter of impermissible judicial bias caused by contributions from interested parties to the campaign coffers of state judicial candidates. In truth, Dupre received all of the process to which he was due. After losing on appeal and at the Ohio Supreme Court, Dupre (and his co-party below, Smart Media, Inc., which appears to have chosen not to pursue a petition for a writ of certiorari) stood silent for nearly a year.

Then, in January of 2007, Smart Media filed a motion to vacate the appellate judgment under Ohio Civil Rule 60. Dupre joined in that motion and filed his own motion for leave to file an untimely motion for reconsideration. Both motions argued that Judge Batchelder -- who had written the majority opinion for the Ohio intermediate appellate court (Ninth Judicial District) overturning a jury verdict for Smart Media and Dupre and awarding judgment to defendants Telxon and Symbol (respondents in this

Court) -- was biased due to campaign contributions by Robert Meyerson, the former CEO of Telxon, to his local Republican Party.[1]

The Ohio Supreme Court appointed an independent panel of state appellate judges from outside the Ninth District to decide the motions. The panel majority applied Ohio Supreme Court precedent in ruling that (1) the Ohio Appellate Rules governed procedure in the courts of appeals, and the Civil Rules were "clearly inapplicable to review the court's judgment on appeal," Pet. App. 6a, *citing Martin v. Roeder*, 665 N.E.2d 196 (Ohio 1996), and (2) that Dupre had failed to show the "extraordinary circumstances" required to extend the deadline for filing a motion to reconsider under the appellate rules. Pet. App. 8a; *see also* Ohio App. R. 14(B) ("Enlargement of the time to file an application to reconsider pursuant to App. R. 26(A) shall not be granted except on a showing of extraordinary circumstances."). Specifically, Dupre's motion came nearly a year after the Ninth District filed its decision, despite the fact that the grounds for his motion -- Meyerson's contributions to his local Republican party -- were a matter of public record well before and during the proceedings below.

---

[1] The underlying action arose from a business dispute between Smart Media (which employed Dupre) and Telxon that resulted in a lawsuit wherein Smart Media and Dupre obtained a $218 million jury verdict. The appellate panel was unanimous that the verdict should be overturned; it was divided only regarding whether to grant judgment to the defendants (as the majority concluded) or to order a new trial (as the dissent concluded). The Ohio Supreme Court denied review.

Dupre then filed an appeal in the Ohio Supreme Court. That court declined jurisdiction and dismissed the appeal as not involving any substantial constitutional question. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

The Ohio court below reasonably ruled, under state law, that Petitioner procedurally defaulted any claim of judicial bias. Petitioner has failed to establish any constitutional violation or to identify a split of authority between state courts of last resort. The petition should therefore be denied.

I. PETITIONER'S PROCEDURAL DEFAULT DOES NOT AMOUNT TO A DENIAL OF DUE PROCESS.

The sole reason for the Ohio courts' denial of Dupre's claim of judicial bias is his failure to follow reasonable procedural rules under state law. The Ohio Constitution gives the Chief Justice of the Ohio Supreme Court authority to "pass upon the disqualification of any judge of the courts of appeals ...." Ohio Const. art. IV, § 5(C). A party seeking to disqualify a judge for the judge's alleged interest in the proceedings may invoke this authority by filing an affidavit of disqualification with the clerk of the Ohio Supreme Court. Ohio Rev. Code Ann. § 2501.13 (West 2007); *see also* Ohio Rev. Code Ann. § 2701.03 (West 2007). Filing an affidavit of disqualification is the sole means of claiming that a judge was biased. *See State v. Hunter*, 783 N.E.2d 991, 995 (Ohio App. Ct. 2002) (citing cases). Dupre never filed an affidavit of disqualification for Judge Batchelder.

Instead, Dupre joined in Smart Media's motion to vacate the appellate panel's merits decision (overturning the jury verdict) under Ohio Civ. R. 60(B) and added his own motion under Ohio App. R. 26(A) and 14(B) for leave to file an untimely motion for reconsideration of the decision. Ohio precedent clearly establishes that Civil Rule 60(B) is "inapplicable to review the [appellate] court's judgment on appeal," for the simple reason that "[t]he Rules of Appellate Procedure govern appeals[.]" *Martin v. Roeder*, 665 N.E.2d 196, 197 (Ohio 1996). The panel majority below did nothing more than correctly apply this controlling precedent.

The panel majority below also correctly denied Dupre's motion for leave to file an untimely motion for reconsideration. Under the Ohio Appellate Rules, motions for reconsideration "must be filed within ten days after filing of the judgment or the announcement of the court's decision, whichever is later." *Id.* An extension of the ten-day deadline is allowed only if the movant shows "extraordinary circumstances." Ohio App. R. 14(B). Dupre's motion came nearly one year after the Ninth District filed its decision. Contrary to Dupre's contention that "[t]he majority [of the second appellate panel] as much as admitted that [he] had established extraordinary circumstances" (Pet. 23), the panel only acknowledged Dupre's contention to that effect. In fact, extraordinary circumstances were plainly absent because Dupre filed his motion nearly a year after the Ninth District filed its decision, despite the fact that the grounds for his motion -- Meyerson's contributions to his local Republican party -- were a matter of public record before and during the proceedings below.

The decision of the state court thus is not a denial of due process, but a straightforward application of state-law procedural rules that does not present a federal statutory or constitutional question warranting this Court's review.

II. THERE IS NO SPLIT OF AUTHORITY AMONG THE STATE COURTS OF LAST RESORT SUFFICIENT TO GIVE RISE TO JURISDICTION.

The cases Dupre cites to show a split in authority among the state courts of last resort are distinguishable both on their facts and on the controlling law. Most notably, none involved a litigant, like Dupre, who failed timely to pursue remedies under state law.

The primary case Dupre cites is *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001). In *Pierce*, the Oklahoma Supreme Court found that a judge's impartiality might reasonably be questioned as the result of contributions to the judge's election campaign, *id.* at 798, and that due process was denied where a judge whose impartiality might reasonably be questioned was not disqualified. *Id.* at 799. But unlike Dupre, the appellant in *Pierce* followed the proper procedure for disqualifying a judge and appealing the denial of that disqualification. *See Pierce*, 39 P.3d at 794-96 (discussing disqualification procedure and determining that appellant was in compliance). The *Pierce* court specifically refused to address a situation where, as here, a party failed to follow the proper procedure for disqualification of a judge, or speculate

as to where such failure might be excusable. *Id.* at 796.[2]

Dupre cites (Pet. 23) three other cases: *Tesco American, Inc. v. Strong Inds., Inc.*, 221 S.W.3d 550 (Tex. 2006); *Powell v. Anderson*, 660 N.W.2d 107 (Minn. 2003); and *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 415 (Ark. 1988). None of these cases involved a procedural default, and -- as to the merits -- none deals with whether contributions to judicial election campaigns warrant disqualification.

III. EVEN ASIDE FROM PETITIONER'S PROCEDURAL DEFAULT, THIS CASE IS A POOR VEHICLE FOR THIS COURT'S REVIEW BECAUSE THE EVIDENCE OF BIAS WAS PLAINLY INSUFFICIENT.

Even aside from Dupre's failure to adhere to reasonable Ohio procedural rules, his claim of judicial bias is so attenuated that it presents an extremely poor vehicle for this Court to take up the questions of whether and when the U.S. Constitution requires that judges who have received campaign contributions must be disqualified.

Dupre points to numerous contributions by Robert Meyerson, the former CEO of Telxon,[3] to the

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[2] Also in contrast to *Pierce*, Judge Batchelder was never a candidate for office during the pendency of Dupre's appeal, and Dupre has presented no evidence that Meyerson ever contributed to Judge Batchelder's campaign for the appellate bench.

[3] Meyerson left Telxon in 1997. Telxon commenced this action in December of 1998. Pet. 6. While Meyerson testified at trial, he was not a party.

Summit County Republican Party. These contributions, along with a subsequent contribution from the county party to Judge Batchelder's judicial campaign in 2000, supposedly serve to establish Judge Batchelder's bias in favor of Telxon.

All but one of the contributions Petitioner cites, however, were not to Batchelder, but to his local Republican Party, which then spent some of its coffers on judicial elections. The single contribution made directly from Meyerson to Batchelder was for Batchelder's 1996 campaign *for legislative office.* This donation came two years before Telxon filed its action for declaratory judgment, four years before Judge Batchelder was elected to the court of appeals, and nearly a decade before the 2005 decision that Petitioner claims was the product of Judge Batchelder's desire to favor a political patron.

To rule that such contributions require disqualification of the judge would essentially mean that every elected judge must be disqualified from hearing cases that touch on major donors to their party, no matter how remote the connection. Dupre implies as much by complaining that "Chief Justice Moyer, a Republican, appointed a panel of ... two Republicans and one Democrat" to hear his case after the judges of the Ninth District Court recused themselves to avoid the appearance of partiality. Pet. 8. Accepting Dupre's theory would effectively end partisan judicial elections altogether, a course this Court declined to take in *Republican Party of Minnesota v. White*, 536 U.S. 765, 782-83 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
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WILLIAM DUPRE,

Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

On July 7, 2008, William Dupre filed his Petition for a Writ of Certiorari with this Court. In the Petition, Dupre stated that the "critical reason for this Court to accept jurisdiction is that if it does not, no other institution will prevent violations of due process that will be suffered upon many more citizens throughout the States." Pet. at p. 32. Dupre also noted that the supreme courts of the several states would not remedy the state judicial processes that allow for large contributions to judges so long as it was in their perceived self-interest to maintain them. *Id.* at 33.

On August 11, 2008, the Ohio Supreme Court, by and through its appointed Judicial Task Force, released its "Revised Proposed Rules on Conduct for Judges." *See*, Press Release, Ohio Supreme Court (Oct. 11, 2008), *available at*, http://www.sconet. state.oh.us/ Communications_Office/Press_Releases/2008/ adminications. The Revised Proposed Rules on Conduct for Judges effectively provide *de jure* approval for limitless indirect contributions by litigants to judges who preside over their cases. Put differently, rather than responding to the constitutional concerns raised by Dupre in the Petition before this Court, Ohio's Task Force has just provided a legal road map for parties who desire to avail themselves of the benefits of contributing large sums to judges whose cases will be decided by those judges.

I. Procedural History.

On February 12, 2007, the American Bar Association released its revised Model Rules for

Judicial Conduct. *See generally*, ABA's Web Site, *available at*, http://www.abanet.org/judicialethics/approved_MCJC.html. Of particular importance to the issue before this Court is an amendment to Model Rule 2.11(A)(4) and the corresponding definition of the word "aggregate." The 2007 Model Rule 2.11(A)(4) established standards for mandatory disqualification when a judge has received large contributions from a litigant. It provides as follows:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> ***
>
> (4)*The judge knows* or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year(s) made *aggregate* contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or greater than $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]

See, ABA's Model Rules, *available at*, http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (emphasis added).

The 2007 Model Rules also defined the word "aggregate" as follows:

> "Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, *but also all contributions made indirectly* with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent.

Id. (Emphasis added).

Approximately six months after the Model Rules were published by the ABA, the Ohio Supreme Court appointed a of group judges and attorneys to the Judicial Task Force. The Task Force was assigned the job of reviewing the proposed amendments and recommending changes to Ohio's Code of Judicial Conduct. According to the Ohio Supreme Court's web site, the process through which the Task Force, and later the Ohio Supreme Court, determined which of the proposed amendments to the Ohio Code of Judicial Code of Conduct would be approved for public comment was as follows:

> In June 2007, Chief Justice Moyer appointed the nineteen-member Task Force on the Code of Judicial Conduct. The Task Force was charged with examining the revised Model Code of Judicial Conduct that was adopted by the American Bar Association in February 2007. Beginning in August 2007, the Task Force conducted a comprehensive review of the ABA Model Code, existing Ohio Code of Judicial Conduct, case law, and advisory opinions. The work of the Task Force during the past eleven

> months produced a proposed Ohio Code of Judicial Conduct that is now being published for public comment by the Supreme Court of Ohio.

See, Ohio Supreme Court's Web Site, *available at*, http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/pubNoticejuly08.pdf.

Regrettably, the Task Force proceeded to strip away those provisions from the Model Code that ensured a litigant's right to an impartial tribunal would not be violated. The definition of the term "aggregate" as provided by the Model Rules was *stricken*:

> ~~"Aggregate," in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate's campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate's opponent.~~

See, Ohio's Proposed Rules for Judicial Conduct, *available at*, http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/terminology.pdf.

The Task Force explained that the "definition of 'aggregate' is stricken, due to the deletion of Rule 2.11 (A)(4), and moved to Rule 4.6." *Id.* Put differently, the Task Force struck the language prohibiting excessive indirect contributions because it chose to delete the very rule that would have ensured that a litigant's right to an impartial tribunal remained inviolate.

As published by the Ohio Supreme Court, Proposed Rule 2.11(A) reads:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> ***
>
> ~~(4)The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year(s) made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or greater than $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]~~

Id. at http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/rule2_11.pdf.

Instead of implementing a procedure that would have allowed Ohio to comply with constitutional mandates, the Task Force deleted the rule altogether. In doing so, the Task Force indicated that "Division (A)(4) relative to the disqualification of a judge who receives a campaign contribution in excess of a specific amount, is not adopted, in part because Rule 4.4 contains what are considered *reasonable contribution limits* applicable to individuals and organizations, including parties, lawyers, and law firms." *Id.*

(Emphasis added). The "reasonable contribution limits" set forth by Proposed Rule 4.4 contain the same loophole that was exploited so brazenly in case *sub judice*.

In accordance with Ohio's Proposed Rule 4.4(J)(3)(a) & (b), a candidate for the Ohio Supreme Court can receive $275,000 from *a* political party per fundraising period, and an appellate court judge can receive as much as $60,000 from *a* political party per fundraising period. *Id.* at http://www.sconet.state.oh.us/boards/JudConductTF/proposedJudCond/rule4_4.pdf.

Setting forth the exception that then swallows the rule, Ohio's Proposed Rule 4.4(N) states that campaign contributions passing through a political party, *shall not* be "aggregated" with contributions made by individuals or organizations:

> (N) In applying the contribution limits contained in division (J) and (K) of this rule, the contributions of an individual or organization to a judicial candidate fund established by a political party *shall not be aggregated* with other contributions from the same individual or organization made directly to the campaign committee of a judicial candidate unless the campaign committee of the judicial candidate directly or indirectly solicited the contribution to the judicial candidate fund.

Id. (Emphasis added).

There are some eighty-eight counties in Ohio. Each one has a political party. As set forth in Rule 4.4(N) contributions made by individuals but through political parties are not aggregated. Exclusive of the state political parties, an individual could contribute $5,280,000 to a judicial candidate for an appellate court per fundraising period, through county parties, without running afoul of the "reasonable contribution limits" established by Proposed Rule 4.4. A candidate for the Ohio Supreme Court could receive $24,200,000 from a litigant, per fundraising period, in the same manner without violating Proposed Rule 4.4.

II. The Ohio Supreme Court's Decision Is Directly Relevant To The Issue On Appeal.

Accompanied with the knowledge that this Petition is pending before this Court, and provided with an opportunity to remedy at least one of the state procedural flaws that gave rise to this Petition, the Ohio Supreme Court elected not to reverse the aforementioned recommendations made by the appointed Task Force. The Proposed Rules are available for public comment. The Model Rules that were stricken, obviously, are not. The fact pattern currently before this Court has been effectively embraced by the Ohio Supreme Court as legally permissible.

Litigants who want to avoid campaign contribution limits need only avail themselves of the county and state political parties within Ohio. Indeed, many of the political party chairmen will prove better advocates for the litigant's position then the litigant. From the perspective of the recipients, they enjoy both the

contribution and plausible deniability. That such a system might further erode the public's faith is lamentable. That the system amounts to nothing less than *de jure* discrimination against those citizens who do not have the financial wherewithal to contribute large sums, does not appear to be a material consideration.

The vast majority of litigants within Ohio, and throughout the country, lack the financial resources to play on a field whose slant has become too steep to climb. As evidenced by Ohio's Revised Proposed Rules on Conduct for Judges, the justices who sit on the state supreme courts will not act in a manner that is contrary to their own perceived interests. Instead of leveling the playing field, they are institutionalizing the slope.

As the state supreme courts appear disinclined to guarantee that all of the players are treated fairly, the question presents itself again: How many more citizens must fall short of the goal line, not as a result of the merits of their cases, but because of tribunals that appear neither fair nor impartial? How many more citizens will have their right to an impartial tribunal violated before this Court intervenes and says no more? This issue and this case are ripe for review.

CONCLUSION

For the foregoing reasons, Dupre respectfully requests that this Court grant his Petition.

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Warsmith, Stephanie, *Mistakes fill GOP finance reports*, Akron Beacon Journal, December 27, 2007, at A1 3

REPLY BRIEF FOR PETITIONER

The three main arguments opposing jurisdiction that were raised in Respondents' brief are fundamentally flawed. The appointed appellate panel ruled that Ohio did not have a remedy for the constitutional injury suffered by Dupre not, as Respondents suggest, that Dupre defaulted. The distinctions Respondents draw between this matter and the other decisions by state courts of last resort are not meaningful and do not aid Respondents' argument. Finally, the fact that campaign contributions were filtered through various political parties and/or committees weighs in favor of granting certiorari. This matter constitutes the perfect vehicle for this Court to address the issue of campaign contributions comprehensively, and not on a piecemeal basis.

I. There Has Been No Procedural Default Because The Appointed Panel Clearly Stated That Ohio Had No Procedural Vehicle Through Which Dupre Could Remedy The Constitutional Violation He Suffered As A Result Of The Ninth District Court Of Appeal's Initial Decision.

Respondents' statement that the "sole reason for the Ohio courts' denial of Dupre's claim of judicial bias is his failure to follow reasonable procedural rules under state law," is demonstrably false. R. at 3. Respondents fail to cite either the appointed panel's order or the Ohio Supreme Court's order declining jurisdiction in support of this brazen claim. The reason for this omission is that neither the panel nor the Ohio

Supreme Court ruled that Dupre was required to file a motion to disqualify a judge or justice before Dupre knew about the circumstances that would warrant disqualification. Respondents' *implicit argument* that Dupre should have known his right to due process was going to be violated because "Meyerson's contributions to his local Republican party – were a matter of public record before and during the proceedings below," is offensive on several fronts. R. at 2, 4.

The factual *premise* of Respondents' implicit argument, that "Meyerson's contributions to his local Republican party - - were a matter of public record before and during the proceedings below," is highly questionable. As Respondents are aware, many of the campaign records for the "local Republican party" were *shredded* by the Summit County Board of Elections shortly after the motion to vacate the Ninth District Court of Appeals' original judgment was filed.[1] *See*, http://www.cpclerk.co.summit.oh.us (Dupre's Reply Memorandum filed on 3-2-07, at fn. 3). Therefore, it is impossible to know what all of the campaign records would have revealed "before and during the proceedings below." R. at 2. Again, Dupre was not permitted to take discovery. Pet. at 9.

What is clear is that campaign records are not required to be filed simultaneously with contributions

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[1] As set forth in the initial Petition, the Chairman of the "local Republican party" was also a board member for the Summit County Board of Elections.

under Ohio law,[2] that at least some of the campaign records (which were reviewed after the original decision) had already been *amended* on multiple occasions, and that, at last count, the financial records for the "local Republican party" were "impossible to audit." Stephanie Warsmith, *Mistakes fill GOP finance reports*, Akron Beacon Journal, December 27, 2007, at A1. Equally troubling is the fact that certain mandatory and relevant disclosures were not made by Judge Batchelder until *after* Smart Media moved to vacate the initial judgment. Phil Trexler, *Ex-Judge is Accused of Bias; Company That Lost $212 Million Verdict on Appeal Contends Donations to GOP Influenced Decision,* Akron Beacon Journal, Jan. 12, 2007, at B1. That Judge Batchelder had been to Meyerson's home to solicit a contribution and recognized Meyerson's name in the record was not information that could be gleaned from the public records. *Id.* It is uncertain what Dupre would have found if he divined that his right to an impartial tribunal was about to be violated "before and during the appeal" of the jury's verdict.

However, even if some of the relevant information was available through the public record (albeit undiscovered), the *conclusion* to Respondents' implicit argument, that it is the obligation of the private

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[2] The Ohio State Bar Association did not even set forth a formal policy statement calling for full and immediate disclosure of campaign contributions in judicial races by candidates until January 13, 2004. *See,* Press Release, Ohio State Bar Association, Ohio State Bar Association Calls For Judicial Campaign Contribution Disclosure (Jan. 13, 2004) *available at* www.ohiobar.org/pub/pr/index.asp?artilceid=158.

litigant or counsel to scour the public records to determine whether the judge will be fair and impartial, is repugnant to this Court's precedent and the United States Constitution. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 830 (1986), the petitioner discovered that Justice Embry had a conflict of interest (that was also a matter of public record) only after the Alabama Supreme Court's original decision. *Id.* Nevertheless, this Court accepted the case and vacated the original decision because Judge Embry was constitutionally "disqualified" from hearing the matter in the first instance. *Id.* at 837. The Fourteenth Amendment places the obligation to refrain from violating a citizen's constitutional rights upon the state actor. The Constitution does not require that the citizen who might suffer a constitutional injury at the hands of a state actor actively investigate that state actor before the injury occurs.

Moreover, what are Respondents actually saying about the justice system and the judiciary in the United States? That although a judge has a constitutional obligation to be fair and impartial, the litigant better make sure his or her judge is not predisposed to violate the Constitution, and the litigant better do so prior to a hearing? That although nearly every state requires judges to disclose circumstances that would lead a reasonable observer to question their impartiality, it is imprudent to believe that judges will actually adhere to the states' ethical canons? *See, i.e.,* Pet. App. at 15a. That although the law presumes that judges are not biased, the law requires counsel to assume they are? Are Respondents really asking this Court to send a message to attorneys practicing law in the majority of

states that elect judges that they cannot trust the judiciary? For the only reason any lawyer or client would have a duty to focus on campaign contributions made to a judge, instead of the law and the facts of a case, is that the law no longer presumed that judges would comply with their own constitutional mandates. Explicitly articulated and logically examined, Respondents' implicit argument offends common sense, fundamental notions of due process, and the integrity of the judiciary as a whole.

Once Respondents' implicit argument is rejected, it becomes clear that Ohio has no procedural process through which Dupre could remedy his constitutional injury. Respondents' brief only underscores this point. R. at 3-4. The state processes that are cited by Respondent are only available to a litigant who discovers the grounds for disqualification prior to a judge's decision. *Id.* Here, Dupre and counsel were unaware of the basis of disqualification until well after the decision. What Respondents are really arguing is that if you discover your constitutional violation after it occurs, Ohio does not have to provide you with a procedural avenue to remedy the violation. There is of course, no authority cited for the proposition that a state can cure a constitutional violation merely by failing to provide a process through which to remedy that violation. For nearly eighty years this Court has consistently stated that such a failure constitutes an additional violation of due process and not a basis for denying review. *See, Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930):

> But, while it is for the state courts to determine the adjective as well as the substantive law of

> the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

While addressing Dupre's motion for leave to file an application for reconsideration, Respondents simply rewrite the majority's decision. Respondents contend that "extraordinary circumstances were plainly absent because Dupre filed his motion nearly a year after the Ninth District made its decision, despite the fact that the grounds for his motion - - Meyerson's contributions to his local Republican party – were a matter of public record before and during the proceeding below." R. at 4. Again, Respondents do not cite to the actual decision authored by the appointed panel. Nowhere in the decision did the panel indicate that extraordinary circumstances were absent. Indeed, the majority, while "acknowledg[ing] Dupre's contention to that effect," declined to dispute it. *Compare,* Pet. App. 7a-8a, *with,* R. at 4. Nor did the majority assert that Dupre's motion was denied because of the passage of time as do the Respondents. *Id.*[3]

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[3] Respondents' argument here is entirely circular. The only reason Dupre had to demonstrate "extraordinary circumstances" in order to obtain leave under Ohio App. R. 14(B) is that the application for reconsideration was not filed within the ten-day period provided by Ohio App. R. 26(A). Had Dupre been aware of the operative facts ten days after the original decision, he would have simply filed the application. Arguing that extraordinary circumstances

Instead, the majority of the panel began by noting that an application for reconsideration could not be employed to undertake "an *ab initio* examination of the appeal on the merits." Pet. App. at 7a. The majority then ruled that they did "not have authority to disqualify a judge for an alleged violation of an appearance standard." *Id.* These rulings would have been completely unnecessary if the majority believed, as Respondents contend, that Dupre had not set forth extraordinary circumstances. Further, these rulings only underscore that the majority's opinion was based on its understanding that the procedural avenue outlined by Ohio App. R. 14(B) would not allow for a *de novo* review of a decision that was authored by a constitutionally disqualified judge.[4] In sum, the majority, after inquiring as to whether "Dupre [has] a procedural avenue to seek the requested relief," concluded that he did not. Pet. App. at 6a.

Ohio's failure to provide a procedural mechanism through which a litigant can challenge a judgment authored by a constitutionally disqualified judge, after the judgment is entered, is not as Respondents suggest "a straightforward application of state-law procedural rules." R. at 5. This failure amounts to a second violation of Dupre's due process rights. *See,*

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were lacking because the application was not "timely" defeats the entire purpose of the rule designed to allow for late filing.

[4] By way of omission, Respondents effectively concede that the last ground stated by the majority of the panel, that Dupre did not file an application for reconsideration before being granted leave, was not a ruling on state procedure that complied with this Court's precedent.

Brinkerhoff-Faris Trust, 281 U.S. at 682. Because the violation of Dupre's Fourteenth Amendment due process right was raised before the appointed panel, Ohio was required to maintain some process through which the violation could be reviewed. *See, Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), *citing, Enter. Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) (noting that "where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.") While the dissent went to extraordinary lengths to illustrate how Dupre's due process rights had been violated, the majority remained conspicuously silent on the issue. This case is ripe for review.

II. There Are No Meaningful Distinctions That Can Be Drawn Between The Case *Sub Judice* And Those Cases Decided By Other State Courts Of Last Resort That Have Held Similar Conduct By State Actors To Be Unconstitutional.

Respondents only half-heartedly contend that the split in authority among the state courts of last resort can be meaningfully distinguished from the case at hand. R. at 5. Respondents contend that *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2001), can be distinguished because the litigant moved for disqualification prior to the judge's decision. *Id.* As noted above, this matter would only involve a procedural default if a party was aware of the contributions before the judgment. Respondents also argue that the campaign contributions did not go directly to Judge Batchelder

while he was a judge and that he was not running for reelection as a judge "during Dupre's appeal." R. at fn.2. Respondents ignore the fact that the local party donated $20,000 to Judge Batchelder while Judge Batchelder was a candidate for judge, and during the same year Meyerson contributed heavily to the party, which was coincidentally the same year Meyerson is known to have learned of the litigation. Pet. App. at 5a. It is respectfully submitted that a contribution in excess of six times the established campaign limits made by a former Chairman of a corporate party, who owns millions in stock and options in that corporate party, that passes through a local political party Chairman (who has a documented history of intimidating judges), to the judge who authors the opinion reversing the largest verdict in county history, are not factors mitigating against bias. Accordingly, Respondents' distinction from *Pierce*, while perhaps factually accurate, is not one that serves their argument.

Respondents then incredibly contend that the "three other cases" cited by Dupre did not involve a "procedural default." R. at 6. That is simply false. According to Respondents' definition of what constitutes a procedural default, a motion filed by an unknowing party after judgment is entered, all three involved procedural defaults. *See, Tesco v. Strong Inds. Inc.*, 221 S.W.3d 550, 554 (Tex. 2006)("We have never before addressed what happens when an appellate opinion and judgment issue before it is discovered that one of the justices is disqualified"); *Powell v. Anderson*, 660 N.W.2d 107, 112 (Minn. 2003)("Approximately one and one-half years after he authored the Powell opinion, Judge Amundson resigned his seat on the

court of appeals."); *Johnson Timber Corp. v. Sturdivant*, 758 S.W.2d 663 (1988)(where the entire Arkansas Supreme Court disqualified itself from hearing two separate petitions for rehearing after this Court's decision in *Lavoie*). All of these courts ordered re-hearings or their procedural equivalents. There are no meaningful distinctions that would ameliorate the conflicts between the state courts of last resort.

III. The Reality Of Parties Seeking To Circumvent Established Campaign Contributions Limits When The Stakes Are High Enough Is What Makes This Case The Perfect Vehicle For Addressing The Relevant Issue.

Respondents contend that this case presents "an extremely poor vehicle to take up the questions of whether and when the U.S. Constitution requires that judges who have received campaign contributions must be disqualified." R. at 6. In support of their contention, Respondents explain that the money was filtered through the local party and omit the fact that the party was chaired by a serial political bully with a history of intimidating judges within his own political party.[5] R. at 7. Put differently, Respondents ask this

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[5] Respondents do not even bother to address Justice Maureen O'Connor's participation in the initial decision to deny jurisdiction (wherein she cast the deciding vote), nor do they attempt to excuse her subsequent refusal to recuse herself after a motion to disqualify was filed the second time the matter appeared before the Ohio Supreme Court. Respondents also ignore all of the money that was received directly or indirectly by the Justice from Meyerson. The fact that Respondents as much as concede these

Court to declare unconstitutional conduct "permissible," if it is undertaken in a sophisticated manner. What a relief that paradigm will be to those litigants who have their rights violated by opposing parties who are simpletons! The problem, of course, is that the individuals who are most inclined to avail themselves of the perceived benefits of contributing heavily to judges hearing their cases, are rarely so foolish. As is also demonstrated by *Caperton v. A.T. Massey Coal Co.*, U.S. Supreme Court Case No. 08-22, when the stakes are high enough, parties will avoid duly enacted campaign finance laws precisely by using third parties and not contributing directly.

The fact that the two cases that have simultaneously come before this Court involve both direct and indirect contribution schemes weighs in favor of granting certiorari not against it. If the Court avoids the issue today and instead waits for the case where only direct contributions are at issue, the issue will evade review only to reappear before the Court at a later date. *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 547 U.S. 1003 (2006)(where this Court denied certiorari after a comprehensive contribution scheme was discovered), *see also, Jones v. Burnside,* 127 S. Ct. 370 (2006)(where the trial judge recused herself after the petition was filed). For if sizeable campaign contributions are determined to cross over the outer boundaries of the Due Process Clause when made directly, parties will stop making direct contributions and employ PACS or political parties. At which point

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constitutional violations weighs heavily in favor of ordering the Writ of Certiorari.

a litigant will again ask this Court the following question: Is that not a distinction without a difference? The constitutional injury is no less severe to those who are deprived of their right to an impartial tribunal regardless of whether the contributions are direct or indirect. Why not hear both cases now and put a stop to the constitutional injuries that are occurring throughout the country, and not as Respondents suggest, decide the issue on a piecemeal basis?

CONCLUSION

The disdain which Respondents have shown for Dupre's right to an impartial tribunal can best be encapsulated by the following passage in their brief: "Dupre received all the process to which he was due." R. at 1. Dupre asks this Court to examine whether Respondents' statement rings true.

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Supreme Court, U.S.
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No. 08-41

In The
Supreme Court of the United States

WILLIAM DUPRE,
Petitioner,

v.

TELXON CORPORATION and
SYMBOL TECHNOLOGIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner William Dupre respectfully petitions this Court for a rehearing of its decision denying Dupre's Petition for a Writ of Certiorari. Dupre petitions this Court on the grounds that *Caperton v. A.T. Massey Coal Co., petition for cert. filed*, Case No. 08-22 (U.S. July 2, 2008) has been reset for a third conference. The questions presented for review by Dupre's Petition for a Writ of Certiorari and Caperton's Petition for a Writ of Certiorari are nearly identical. Accordingly, if this Court were to issue a writ of certiorari in *Caperton*, that event would constitute an intervening circumstance of substantial or controlling effect that would warrant a rehearing of Dupre's Petition for a Writ of Certiorari.[1]

I. The Questions Presented by *Dupre v. Telxon, petition for cert. filed*, Case No. 08-41 (U.S. July 7, 2008) and *Caperton v. A.T. Massey Coal Co., petition for cert. filed*, Case No. 08-22 (U.S. July 2, 2008) are identical, integral to a functional Due

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[1] This Court denied Dupre's Petition for a Writ of Certiorari on October 6, 2008, after the September long conference. Accordingly, Dupre's time for filing his Petition for a Rehearing was set to expire on October 31, 2008. *Caperton* was reset for conference for October 31, 2008. Dupre was therefore faced with the proverbial "no win" situation. Dupre could either file his Petition for Rehearing before the Court issued a decision in *Caperton* or allow the allotted time for filing to expire. Because this Court is now entertaining the *Caperton* Petition in conference for the third time, there is good reason to believe it will grant the Petition for a Writ of Certiorari in that case.

Process Clause, and both cases should be heard together.

In his Petition for a Writ of Certiorari, Hugh M. Caperton presented the following question for review:

> Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court - more than 60% of the total amount spent to support Justice Benjamin's campaign – while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. *The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.*

Caperton Pet. at i (emphasis added).

In his Petition for a Writ of Certiorari, Dupre presented the following question for review: "Whether there are any circumstances under which a party litigant's exorbitant campaign contributions, made to the presiding judge and/or justice, while the matter is pending, can violate the opposing party's right to an impartial tribunal." Dupre Pet. at i. Not only do both cases bear strikingly similar questions presented, the

legal issues and facts arising from the cases share a strong resemblance.

In Dupre's case, the majority issued the following recitation of the facts:

> Robert F. Meyerson, a one-time Chairman and CEO of Telxon, held an ownership interest through himself and/or his "affiliates" in the amount of 7.6 million dollars as of mid-January 2000. Appellees allege that Meyerson was not only a key witness in the case but also Judge Batchelder's largest and long standing contributor. At a time when Meyerson is said to have known about the pending litigation – as early as the spring of 2000 – Meyerson donated $50,000 to the Republican Party of Summit County. A battery of additional donations in the fall of 2000 is listed in the respective chronological amounts of $50,000, $110,000, $100,000, and $25,000, so that, all in all, Meyerson donated $335,000 to the county party during the calendar year 2000. (In October 2000 the party itself contributed $20,000 to Judge Batchelder's judicial campaign). During the year 2001, Meyerson donated an additional $202,500 to the county party. And in 2003, Meyerson donated $55,000 to the county party, earmarking $50,000 for the "Judicial Fund." Also, for his 1996 campaign for the Ohio House of Representatives – prior to his elevation to the bench – Judge Batchelder allegedly received $15,000 from Meyerson, visited Meyerson at Meyerson's home to solicit the contribution and later entertained Meyerson at his (Batchelder's)

> home following receipt of the political contribution. That sum - $15,000 – is described as nearly one third of the total funds raised for Batchelder's House campaign for that election cycle.

Dupre Pet. App. at 5a.

Dupre's case and the *Caperton* matter both contain fact patterns involving exorbitant campaign contributions from appellants to the judges and/or justices who eventually overturned multi-million dollar verdicts. As a result, the dissenting judges/justices in both cases voiced the same constitutional concerns. In Dupre's case the dissent noted that the decision penned by the majority could not pass constitutional scrutiny under this Court's precedent:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to average man as a judge...not to hold the balance, nice, clear and true between the State and the accused denies the latter due process of law.

> Such a stringent rule may sometimes bar trial by judges who have not actual bias and who would do their very best to weight the scales of justice equally between contending parties. But, to perform its high function in the best way 'justice must satisfy the appearance of justice.'

Dupre Pet. App. at 11-12a, *citing Tume v. Ohio,* 273 U.S. 510, 532 (1927), *In re Murchison*, 349 U.S. 133, 136 (1955); *and, Offutt v. United States*, 348 U.S. 11, 14 (1954).

In *Caperton,* the dissent concluded that the same due process issues existed: "Upon reviewing the cases of *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133, 136 (1955),... it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts." Caperton Pet. App. 146a, n.16. The similarity between the two cases was also observed by the *Amici Curiae* in *Caperton*.

After having reviewed both the Caperton and Dupre Petitions, *Amicus Curiae* Public Citizen urged this Court to grant certiorari in both matters. *Caperton, Brief of Amicus Curiae Public Citizen, filed*, (U.S. Aug. 4, 2008) at 2-3. *Amicus Curiae* The American Bar Association argued that "public confidence is being eroded by activities such as those at issue in this case and others like it." *Caperton, Brief of Amicus Curiae Public Citizen, filed*, (U.S. Aug. 4, 2008) at 7, n. 10. "The most recent example is *Dupre v. Telxon Corp.*" *Id.* That these two cases share the same constitutional questions is not the product of

wishful thinking by a litigant, but the objective observation held by numerous parties.

Where this Court has granted certiorari in favor of a subsequent petition, after having previously denied certiorari based on the same question presented, it has not hesitated to vacate the prior order and grant a petition for rehearing. *See, e.g., Boumedien v. Bush,* 127 S. Ct. 3078 (2007), *Odah v. United States*, 127 S. Ct. 3067 (2007), *Soto v. United States,* 543 U.S. 1117 (2005). This Court has also elected to vacate the order denying certiorari, hold the similar case, and then remand with instructions that the case be decided in accordance with the holding of the similarly situated matter. *See, Capital Area Right to Life v. Frankfurt*, 511 U.S. 1135 (1994) (O'Connor dissenting). In the event that this Court grants certiorari in *Caperton*, the Ohio Supreme Court should at least have the opportunity to revisit its decision in *Dupre* in light of the Court's ruling in *Caperton*. For if this Court grants certiorari in *Caperton* and does not vacate its denial of certiorari in *Dupre*, Dupre will be forever barred from seeking a remedy to the constitutional violation he suffered below.

CONCLUSION

For the foregoing reasons, Dupre respectfully requests that this Court grant his Petition for Rehearing and either grant certiorari or hold his case until such time as a final decision in *Caperton* has been reached.

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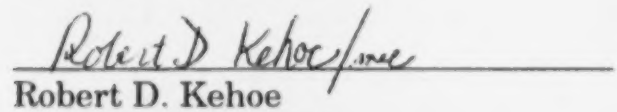
The foregoing Petition for Rehearing is restricted to the grounds specified in S. Ct. R. 44.2, and it is presented in good faith and not for purposes of delay.

Respectfully submitted,



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